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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

WILLIAM O. JORDAN,

Petitioner,

v.

FRANK L. ZORC,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) In a defamation case, does the Seventh Amendment, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678 (1989), and *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949 (1984), allow an appellate court to retry the jury's factual determinations, when undertaking its independent review to determine actual malice?

2) Was the Florida Court of Appeal in error under the First Amendment and *Milkovich v. Lorain Journal*, 497 U.S. 1, 110 S.Ct. 2695 (1990), in categorizing Respondent's statements as expressions of opinions that are shielded from Petitioner's claim of defamation?

3) Was the Florida Court of Appeal's determination of no actual malice erroneous under the First Amendment and the *New York Times* doctrine?

LIST OF PARTIES

Petitioner and Respondent were the only parties in the court below.

LIST PURSUANT TO RULE 29.6

Petitioner: William O. Jordan
Respondent: Frank L. Zorc
Parent Companies and Subsidiaries: None

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the decision of the Florida District Court of Appeal, Fourth District, entered in this case on July 5, 2000.

OPINIONS BELOW

The opinion of the District Court of Appeal is reported at 765 So.2d 768 and is reproduced in the Appendix at App. 3. The order of the Supreme Court of Florida denying review is unreported and is reproduced at App. 1.

JURISDICTION

The opinion of the Florida District Court of Appeal was entered July 5, 2000. A timely petition for review by the Florida Supreme Court was denied January 29, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment of the Constitution of the United States, provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

> fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The First Amendment of the Constitution of the United States, provides:

> Congress shall make no law . . . abridging the freedom of speech . . .

STATEMENT

Petitioner, a public official, was defamed by Respondent, a private citizen, who published and disseminated statements to the public accusing him of fraud, influencing an appraiser to inflate the value of his land, illegally influencing the City of Vero Beach to purchase his land in eminent domain proceedings at an inflated price, and obstructing justice.

Petitioner brought a defamation lawsuit against Respondent in the Circuit Court of Indian River County, Florida. Respondent defended by claiming his statements were not false, that they were expressions of opinion and that they were not made with actual malice. The jury found in favor of Petitioner and awarded $1,800,000 in compensatory damages and $2,900,000 in punitive damages. The Fourth District Court of Appeal reversed for entry of judgment for Respondent.

A. The Trial

Trial was held before a jury to determine whether Respondent should be held liable for defamation.

Petitioner's evidence presented a question of fact as to whether Respondent's statements were false and whether he knew they were false when he made them. The jury resolved those factual issues in Petitioner's favor.

At the time pertinent to this lawsuit, Petitioner was a businessman in Vero Beach, a member of the City Council, and the City Mayor. Petitioner owned a parcel of land, on which he had rental property. The City wanted to acquire a strip of the land by eminent domain in order to widen a road. Petitioner recused himself from taking part in the City Council's decision-making process in regard to his property. Following the normal procedure, the City hired an appraiser, Petitioner hired an appraiser and a third appraiser was hired to give the City Council their opinions as to the damage that should be paid to Petitioner for taking his property. One appraiser appraised Petitioner's property taken at $11,900 and another appraised it at $9,500. The opinion of Petitioner's appraiser, Mr. Kmetz, was that the value of Petitioner's property taken was $34,000 and he voiced that opinion in his appraisal. He also placed in his appraisal, at Petitioner's request, the fact that Petitioner himself felt his damages were $50,000. It has never been disputed that Kmetz's appraisal made clear that his opinion was that the value of Petitioner's property taken was $34,000, not $50,000, even though Petitioner was of the opinion his damages were $50,000.

During Respondent's opening statement at trial, his counsel admitted that Kmetz's appraisal drew a distinction between his [Kmetz's] own opinion of $34,000 and Petitioner's personal opinion of $50,000 (Tr.21):

> Mr. Zorc also learned . . . that Mr. Jordan had an appraiser who had two numbers in his report. One was the number of $50,000 that Mr. Jordan thought he should be paid for the property and another number was from Mr. Kmetz who is not an MAI appraiser. And Kmetz said the value for the land was about $34,000.

Respondent also admitted at trial that he was aware that Kmetz's opinion was $34,000, that it differed from Petitioner's own opinion of $50,000 and that Kmetz's appraisal informed the City of that distinction. Respondent testified (Tr.442-43):

> His [Petitioner's] appraiser . . . indicated that the appraised value in his opinion of the property was $34,000. He did have the figure of $50,000 in his appraisal, but he admitted that . . . that was not his opinion. . . . He put that 50 thousand figure in his appraisal solely at the request of Mr. Jordan because that was Mr. Jordan's belief of what the property was worth which was not what the appraiser's belief as to what the property was worth.

Petitioner had consulted with an attorney who told him he had every right to have the City Council informed as to what he personally thought his own property was worth (Tr.36). Testimony established that appraisers are to consider the value a landowner places on his property in condemnation cases, even if they do not agree with it, as here (Tr.237-38). Petitioner testified his $50,000 figure was not just based on the value of the land actually being taken, but it was also based on the damage to the remaining land on which he had rental property (Tr.31-32). For example, the City's right-of-way was now right up

against the window of his rental house, rather than 25 feet away as it had been. And, there was now a power pole in the middle of the driveway so the tenants could not get onto the property (Tr.37).

The City Council voted to purchase Petitioner's land for $32,500 at a closed-door meeting, where a number of matters were considered, and the meeting was ultimately determined to be violative of Florida's "Sunshine Law," § 286.011(1), *Fla. Stat.*[1] Petitioner did not attend the meeting and had nothing to do with it (Tr.38). Respondent admitted at trial that he was aware Petitioner had not attended the meeting (Tr.432). Petitioner did not lobby the Council members individually, as he could do as a private citizen (Tr.30). City Council members testified that Petitioner did not attempt to influence their opinion as to the value of his land (Tr.164,242,311,315,323).

Respondent published and disseminated five documents containing slanderous and libelous statements about Petitioner.

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[1] *Zorc v. City of Vero Beach*, 722 So.2d 891 (Fla. 4th DCA 1998), *rev. den.*, 735 So.2d 1284 (Fla. 1999) held that the City could not hold a private meeting to discuss cases the City had pending in litigation, which included a bankruptcy case pertaining to Piper Aircraft, a case with Respondent, and the eminent domain proceeding involving Petitioner's property. This "Sunshine Law" violation by the City Council has no bearing on the defamatory statements made by Respondent about Petitioner discussed in this brief. Moreover, Petitioner did not attend the City Council's meeting and had no involvement in that meeting whatsoever.

1) One document was styled in the form of a legal pleading to give it some form of legitimacy and to confuse the reader (App.17). It stated that Petitioner may have committed malfeasance, misfeasance or obstructed justice **by a fraudulent attempt to modify normal professional property appraisals, by imposing his personal value convictions upon his appraiser, and by asking his appraiser to inflate the value of Petitioner's land** that the City was acquiring (App.17). The document states that Petitioner's purpose was to discredit two other appraisers' values, and gain far more money than those appraisers valued the land (App.17-18). The document attaches two exhibits, "Exhibit A" and "Exhibit B."

Even under Respondent's own testimony at trial, quoted *supra*, he was well aware that Petitioner never attempted to modify his appraiser's opinion, or impose his own value for his land on his appraiser. Nor did he ask his appraiser to inflate the value of his land. It has never been disputed that Kmetz's opinion, as set forth in his appraisal, was that the value of Petitioner's land taken was $34,000, even though Petitioner's separate opinion was that his damages were $50,000. Petitioner never asked Kmetz to change his opinion or inflate his opinion as to the value of his land. He only asked Kmetz to **also indicate** in his appraisal that **Petitioner** thought the value of his damages was $50,000. And that is all Kmetz did, and Respondent was well aware of that fact. He admitted it at trial.

2) The next document is Exhibit A to the previously discussed document. **It falsely states that Kmetz's appraised value of Petitioner's land was $50,000** (App.19), when Respondent knew that to be false, as his

trial testimony quoted, *supra*, indicates. The document then indicates that Attorney Kretschmer, the City's Attorney, had stated that Kmetz testified in a deposition that "**solely at the request of Councilman Jordan, he inflated the appraised value to $50,000, rather than Kmetz's professional opinion of $34,000.**" (App.19). That was flatly false. The document distorts Kretschmer's statements reflected on Exhibit B (App.20). Respondent knew that Kmetz never changed or inflated his appraised value of Petitioner's property from $34,000 to $50,000, as he readily admitted at trial. The document also states that **"this appears" to be a fraud on the taxpayers and Petitioner's fellow City Councilmen**, when Respondent's own testimony indicated that he was aware that there was no fraud (App.19).

3) The next document falsely states that Petitioner "**influenced his appraiser to change his professional value to recite a value nearly 500% larger than 2 MAI appraisals.**" (App.22) (500% of $11,900 is $59,500). Respondent knew when he made that statement that Petitioner never influenced Kmetz to change his opinion to $50,000 (much less $59,500), as indicated by his above-quoted trial testimony. The document also states that Kmetz gave up his professional ethics when he "**changed to an 'owner's opinion of value' departing from his own professional determination**" (App.22). Respondent knew that was false. Kmetz never changed his opinion to $50,000. The document states that Petitioner's actions were "**at least unethical and perhaps illegal for an elected official trying to influence other elected officials while aborting the system of fairness and justice.**"

(App.23). Petitioner never did anything unethical or illegal, and Respondent knew it.

The jury saw Petitioner testify and heard him deny that he had ever attempted to influence Kmetz or the City Council. Petitioner went through each document discussed, *supra*, and testified how and why the statements contained therein were absolutely false (Tr.27-39). City Council members testified that Petitioner had never attempted to influence their vote or their opinion on the value of his property (Tr.164,242,311,315,323). The jury believed Petitioner's evidence. The jury's verdict determined that Respondent's statements were false, and that he knew they were false when he made them (App.13-14).

B. The Appeal

Respondent appealed to the Fourth District Court of Appeal arguing, *inter alia*, three reasons why he was entitled to a directed verdict: his statements were true, they were expressions of opinions, and they were made without actual malice (Brief of Appellant, Fla. Dist. Ct. App. at 24-25). Petitioner contended that Respondent's statements were false statements of facts, not opinions, which Respondent knew to be false, and that they were published with actual malice (Appellee's Answer Brief, Fla. Dist. Ct. App. at 8-18).

The Court of Appeal reversed, citing this Court's opinion in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678 (1989) for the proposition that the scope of review in defamation cases is highly unusual and essentially does away with the notion

that an appellate court will defer to the factfinder's application of the law to the facts. Instead, the Court of Appeal stated that it could conduct its own independent review of the evidence and determine for itself whether the evidence was sufficient to meet the requirements of the First Amendment. The court then proceeded to simply retry the case.

The Court concluded that Respondent's documents did not contain false statements of fact, stating that "the testimony at trial confirmed the accuracy of those facts." (App.11). In fact, the evidence presented at trial clearly showed that the statements were absolutely false, and Respondent's own testimony at trial essentially acknowledged that. The Court's factual conclusion that the statements were not false was directly contrary to the jury's factual conclusion that the statements were false.

Next, relying upon one of Petitioner's answers in the lengthy trial, the Court of Appeal concluded "thus by his own testimony, Appellee [Petitioner] acknowledged that Appellant's [Respondent's] comments concerning the propriety of his conduct constituted opinions rather than facts" (App.11). That is simply not true. Petitioner testified repeatedly that the documents contained false statements of fact (Tr.21-39). All of Petitioner's testimony had to be considered, not just one answer. The Court did nothing more than retry the issue, substituting its opinion for that of the jury.

The Court of Appeal concluded by stating (App.11-12):

> In conclusion, we hold that the allegedly defamatory statements were opinions based upon the facts set forth in the documents, which were true. We also hold that appellee did not prove that the facts upon which the opinions were based were false or that appellant's assessment of them was erroneous. Therefore, the trial court should have entered a directed verdict in favor of appellant. *Harte-Hanks*, 491 U.S. at 666 n.7, 109 S.Ct. 2678. See *New York Times*, 376 U.S. at 254, 84 S.Ct. 710; *see also Seropian*, 652 So.2d 490; *Scandinavian World Cruises v. Ergle*, 525 So.2d 1012 (Fla. 4th DCA 1988); *Friedgood*, 521 So.2d at 242; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Having concluded that the statements were opinions based on facts that were not false, we do not need to reach the issue of malice.

Petitioner sought review of the Court of Appeal's opinion, but the Florida Supreme Court denied review (App.1).

REASONS FOR GRANTING THE WRIT

The Florida Court of Appeal has taken a major departure from, or has misconstrued, this Court's opinions in *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949 (1984), *Harte-Hanks, supra*, and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

I. The Court's *De Novo* Review Violates *Bose*, *Harte-Hanks* and the Seventh Amendment

Bose and *Harte-Hanks, supra,* hold that in cases involving an alleged defamatory falsehood about a public official, a reviewing court is required to conduct its own independent review of the evidence and determine for itself whether the evidence is sufficient to meet the exacting requirements of the First Amendment that actual malice be demonstrated by clear and convincing evidence.

This independent examination of the record is "not equivalent to a *'de novo'* review. *Bose,* 466 U.S. at 514 n.31, 104 S.Ct. at 1967 n.31. It does not mean that a reviewing court can resolve factual disputes in the evidence to its own satisfaction and thereby ignore the traditional function of the jury. As stated in *Bose* (*Id.* at 499-500):

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose,* 466 U.S., at 99-500, 104 S.Ct. at 1958-1959, the reviewing court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,' " *New York Times Co.,* 376 U.S. at 285, 84 S.Ct. at 728.

As Justice Scalia noted in his concurring opinion in *Harte-Hanks*, the *Bose* holding of "independent assessment" means "assuming all of the facts that could be found in favor of the plaintiff were found in favor of the plaintiff, [whether] clear and convincing proof of malice was established." [e.o.] *Harte-Hanks*, 491 U.S. at 697, 109 S.Ct. at 2701 (Scalia, J., concurring in the judgment). Both Justices White and Kennedy pointed out, 491 U.S. at 694, 696, 109 S.Ct. at 2699, 2700, that that view was not at all inconsistent with the majority opinion of Justice Stevens, especially as shown in the following passage:

> Petitioner concedes that "when conducting the independent review mandated by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility." *** It contends, however that this Court did reject the trial court's credibility determination in *Bose*. We disagree with this reading of *Bose*. In *Bose*, we accepted the trial court's determination that the author of the report at issue did not provide credible testimony concerning the reason for his choice of words and his understanding of the meaning of the word "about." *** Unlike the District Court, however, we were unwilling to infer actual malice from the finding that the witness "refused to admit [his mistake] and steadfastly attempted to maintain that no mistake had been made – that the inaccurate was accurate."

Harte-Hanks, 491 U.S. at 689, n.35, 109 S.Ct. at 2696, n.35.

Florida's approach is contrary to *Bose* and *Harte-Hanks* and has brought the Seventh Amendment guarantee of trial by jury in all common law cases into direct

conflict with the First Amendment. The law of libel has deep roots in the common law, and this Court must guard against the danger that the judiciary will "usurp the role of the jury and burden the appellate courts with original jurisdiction in libel actions impinging on a plaintiff's constitutional right to a jury trial." *Connaughton v. Harte-Hanks Communications*, 842 F.2d 825, 842 (6th Cir. 1988), *aff'd*, 491 U.S. 657, 109 S.Ct. 2678 (1989).

Here, the Florida Court of Appeal did nothing more than retry the case. It made itself a "super-jury," redetermining the jury's factual findings. The jury determined that Respondent's statements were false. Under *Bose* and *Harte-Hanks*, the Florida Court of Appeal should have accepted the jury's factual finding in that regard, since it was amply supported by the evidence presented at trial. Instead, the Court of Appeal retried this issue and came to the contrary conclusion that Respondent's statements were true. Florida did exactly what it was not to do in defamation cases, that is, redetermine the jury's factual finding on the issue of falsity.

A review of the record shows that Respondent's statements were clearly false and/or a fact-finder could reasonably so conclude. Both Respondent's counsel and Respondent admitted at trial that Kmetz's appraisal indicated to the City Council that his value of Petitioner's damages from the taking of his property was $34,000, whereas Petitioner's value was $50,000. Therefore, Respondent's own testimony admitted that Kmetz never modified or changed his opinion from $34,000 to $50,000,

as a result of Petitioner's undue influence. Yet, that was exactly what Respondent's documents falsely stated. It is actually difficult to see how the jury, or anyone else, could conclude that Respondent's statements were anything but false.

II. The Florida Opinion Conflicts With This Court's Opinion in *Milkovich v. Lorain Journal*

Milkovich rejected a wholesale defamation exemption for anything that might be labeled "opinion." *Milkovich*, 110 S.Ct. at 2706. Instead, the Court held that where a statement of "opinion" implies false and defamatory facts regarding public officials, and the statements were made with knowledge of their false implications or with reckless disregard of their truth, they are not constitutionally protected. 110 S.Ct. 2706.

The Florida Court of Appeal held that Respondent's documents set forth accurate facts about which he simply voiced certain opinions. That is not true. As demonstrated, *supra*, the facts stated in Respondent's documents were false. The documents stated that Kmetz appraised Petitioner's property for $50,000, and that Petitioner fraudulently asked Kmetz to inflate the value of his land to $50,000, and influenced Kmetz to change his value by 500%, thus defrauding taxpayers and the City Council, which was unethical and/or illegal. Those statements were untrue, and Respondent's own trial testimony indicates that he knew they were untrue.

Milkovich provides further support for the fact that the Florida Court of Appeal should not have retried the

falsity issue. *Milkovich* stated that on the falsity issue, the dispositive question is whether a "reasonable fact-finder" could conclude that the statements implied false and defamatory facts. 110 S.Ct. 2707. Here, not only did the jury reasonably conclude that the statements were false, but there was ample record evidence to allow the jury to come to that conclusion.

The Florida Court of Appeal's categorization of Respondent's statements as expressions of opinions that are shielded from a claim of defamation is also not well founded. "Even if the speaker states the facts upon which he bases his opinions, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications." *Milkovich*, 110 S.Ct. 2706.

In interpreting and applying *Milkovich*, the Ninth Circuit has adopted a three-part test to determine whether a reasonable fact-finder could conclude that a contested statement implied an assertion of objective facts: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proven true or false. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1980), *cert. den.*, 499 U.S. 961, 111 S.Ct. 1586 (1991). Applying this test, Respondent's statements were assertions of fact, not opinion. The clear impact of Respondent's statements were that Petitioner influenced his appraiser to change his [the appraiser's] opinion as to the value of Petitioner's property from

$34,000 to $50,000, which constituted a fraud on the City Council and taxpayers. Respondent's statements constituted an expression of fact, not opinion, and could "reasonably be interpreted" as such by the jury. *Milkovich,* 110 S.Ct. at 2706.

III. The Florida Opinion Conflicts With the New York Times Doctrine

In *New York Times,* this Court established the constitutional rule that a public figure/official cannot recover damages for defamation without clear and convincing proof that a false statement was made with actual malice – that is with knowledge that it was false or with reckless disregard of whether it was false or not. 376 U.S. at 279-80, 84 S.Ct. at 726. As discussed, *supra,* in reviewing the trier of fact's "actual malice finding" the court is to conduct an independent review of the record, deferring to the trier of fact's factual findings.

The Florida Court of Appeal stated that it did not have to reach the issue of actual malice, because it found that Respondent's statements were opinions based on facts that were not false. Nonetheless, the Court stated in a footnote that the record did not contain clear and convincing evidence of malice, citing to this Court's opinion in *Harte-Hanks.* However, the Court of Appeal's independent review of the record to determine whether malice exists cannot **ignore** the evidence. A review of the statements made in Respondent's documents, and his testimony at trial, show that he knew his statements were false. He told his readers that Kmetz appraised Petitioner's property at $50,000. His testimony admitted that

he knew Kmetz's opinion was that the value of the property was $34,000. Respondent also said Kmetz "inflated" the appraised value from his professional opinion of $34,000 to $50,000, at Petitioner's request. Respondent's testimony admitted that Kmetz did nothing more than also include in his appraisal the fact that Petitioner felt his loss was $50,000. Kmetz never inflated his own professional opinion, which Respondent admitted knowing remained at $34,000. Respondent also said that Kmetz changed and modified his appraisal value at Petitioner's request, which Respondent's testimony shows was untrue. Not only were these individual statements false and defamatory, but the documents as a whole presented a false and defamatory impression of what had occurred. Accordingly, the evidence in the record is sufficient to support a finding of actual malice.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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April 30, 2001

APPENDIX 1

Supreme Court of Florida

MONDAY, JANUARY 29, 2001

CASE NO.: SC00-1583
Lower Tribunal No.: 4D98-3929

WILLIAM O. JORDAN vs. FRANK C. ZORC

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

The Motion for Attorney's Fees is granted and it is ordered that Respondent shall recover from Petitioners the amount of $2,500.00 for the services of Respondent's attorney in this Court.

WELLS, C.J., and SHAW, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh

Served:

JOSEPH D. FARISH, JR.
WAYNE TOSKO
RICHARD A. SHERMAN
HON. JEFFREY BARTON, CLERK
HON. MARILYN BEUTTENMULLER, CLERK
HON. CHARLES E. SMITH, JUDGE

APPENDIX 2

Frank L. ZORC, Appellant,

v.

William O. JORDAN and Carol Jean Jordan, his wife, Appellees.

No. 4D98-3929.

District Court of Appeal of Florida, Fourth District.

July 5, 2000.

Richard A. Sherman and Rosemary B. Wilder of Law Offices of Richard A. Sherman, P.A., Fort Lauderdale, and Wayne Tosko of Nelson & Tosko, Orlando, for appellant.

Joseph D. Farish, Jr. and Peter M. Bassaline of Farish, Farish & Romani, West Palm Beach, for appellees.

PER CURIAM.

Frank L. Zorc appeals from a final judgment awarding William O. Jordan compensatory and punitive damages in a libel and slander action. We reverse and remand for entry of a final judgment in favor of Frank L. Zorc.

William O. Jordan and Carole Jean Jordan, his wife, filed a Complaint against Frank L. Zorc ("appellant").[1] In his Complaint, William Jordan ("appellee") alleged the following: that he was and is a businessman and was a member of the City Commission and the Mayor of the

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[1] The trial court entered Final Summary Judgment in favor of Frank L. Zorc as to Carole Jean Jordan's claim. Carol Jean Jordan appealed, and this court per curiam affirmed the trial court's judgment. *Jordan v. Zorc*, 727 So.2d 940 (Fla. 4th DCA 1998).

City of Vero Beach; that he owned a parcel of land that the City wanted to acquire by eminent domain proceedings in order to widen a road, and that during the proceedings, appellee hired an appraiser to render an opinion as to the value of his property; that based on this appraiser's evaluation, the City Commission voted to pay appellee $32,500; that appellant published and disseminated slanderous and libelous statements regarding appellee and his conduct during the appraisal of his property and the meetings held in relation thereto; and that appellant made false and defamatory statements that appellee illegally influenced his appraiser and the City of Vero Beach, through its counsel, to fraudulently obtain money and obstruct justice in legal proceedings.

Appellee attached five documents to his Complaint. He alleged that the following excerpts from those documents contained slanderous and libelous statements. The emphasis contained in the excerpts is from the original complaint and the attached documents:

> "And when an owner such as Jordan influences his appraiser to change his professional value to recite a value nearly *500%* larger than two M.A.I. appraisals, the system is broke. Why not have each party just name their own value? Why even use an appraiser? . . . Jordan's actions were at least unethical and perhaps illegal for a elected official trying to influence other elected officials while aborting the system of fairness and justice. I intend to object to the amount the City voted to pay Mr. Jordan at the secret meeting. YES, that closed to the public meeting *needs full Re examining and Re discussion* before they make a 'NEW legal decision' what to pay, at a proper OPEN PUBLIC MEETING."

"Question – for Mr. Jordan: 'Considering, the long time *'Jordan Political Stature ', certainly* such a figurehead should know the Sunshine Law does not permit a secret meeting to take final action and pay $32,500.00! WHY did you take this money? You should have called for 'An Open Public Meeting'. I think you were 'overpaid', wrongly paid, and wrongly accepted tax money for your land *approved in secret*. Our constitutional rights were taken from us. A complete new 'Open to The Public' discussion must be held. You may owe a refund to us."

"It now further appears: That an elected official Councilman Bill Jordan of the City of Vero Beach may have committed acts of malfeasance and or misfeasance, and or obstructing the normal plan of justice for the protection of the taxpayers, by a fraudulent attempt to modify normal professional property appraisals that are obtained to protect the public, by imposing his personal value conviction upon a State of Florida licensed property appraiser, and then 'asking that appraiser' to inflate the value of Mr. Jordan's *'own'* real estate land the City was acquiring. His purpose appears to have been to discredit and reject two M.A.I. appraisers value factors. This was to gain Mr. Jordan incredibly far more money from the City and Taxpayers than the *two* other professional M.A.I. appraisers valued the land. Furthermore, Council final actions on this matter were taken at an apparently improper illegal closed secret meeting."

At trial, appellee testified that the appraisal amounts stated in the documents were true and that two M.A.I. appraisers appraised his property at $11,900 and $9,500.

He also testified that Mr. Kmetz, who appraised the property at $34,000, using appellee's own personal figure of $50,000, was not an M.A.I. appraiser. Appellant's counsel questioned appellee concerning the information contained in the documents:

> Q. We have two documents, Exhibit A and B, that Mr. Zorc attached to this complaint that renders his opinion. You have said that the appraisal of Armfield, $11,900, that's accurate, the nine-five is accurate. Kmetz' report of the $50,000 and $34,000. You have already said that we have a transcript that he attached where Kmetz put the $50,000 at your request, and then isn't it true is that what Mr. Zorc did, he simply took that information and he shared it with the reader, and he rendered an opinion about what went on there; isn't that true?
>
> A. For about the 15,000th time, I guess he did that.

Appellant's counsel further asked appellee whether the reader could "look at [the documents] and . . . say I don't think there is enough information to draw a conclusion one way or another?" Appellee responded, "I suppose so."

During appellee's case, at least five witnesses testified that there were no Sunshine Law violations in the City's actions concerning appellee's property. However, appellant correctly points out that after the entry of the verdict and judgment in the case sub judice, the trial court entered an order in a pending action (lower court case number 97-0401) in which appellant challenged the validity of the meetings where the Commission voted to pay appellee $32,500. The trial court entered a Partial

Summary Judgment in that case, citing to this court's opinion of *Zorc v. City of Vero Beach*, 722 So.2d 891 (Fla. 4th DCA 1998), *rev. denied*, 735 So.2d 1284 (Fla.1999),[2] and declared the meetings in violation of the Sunshine Law.

Appellant testified that for the past forty years, he has been a member of the Indian River County Tax Payers Association, a watch dog group that makes sure "taxes are not unwisely used or foolishly spent." He said that he only learned about appellee's actions and the closed meetings involving the purchase of appellee's property when he researched the minutes of the City Commission in preparation for a case involving his airport property. He stated that he consulted with no less than ten attorneys, and in their opinion, he was correct that a Sunshine Law violation occurred as a result of the closed meetings. His research revealed that the City took a strip of property from the homeowners located on 10th Avenue, including appellee's rental property, in order to widen the street and make a sidewalk. He testified that he discovered that the City paid each homeowner approximately $10,000, yet paid Jordan $32,500. He distributed the five documents referenced in appellee's Complaint, all packaged together as one unit, to approximately twenty to twenty-five people he considered interested parties. He testified that he used the words "apparently" and "appears" because it was his opinion until the matter

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[2] In *Zorc v. City of Vero Beach*, 722 So.2d 891 (Fla. 4th DCA 1998), *rev. denied*, 735 So.2d 1284 (Fla.1999), this court concluded that closed-door meetings concerning Zorc's airport property violated section 286.011(1), Florida Statutes (1995), the "Sunshine Law."

was resolved in court. He also stated that he made statements in the documents that he believed to be true and that he stopped writing and publishing about appellee after he was no longer an elected official.

The jury returned a verdict in favor of appellee and awarded $1.8 million in compensatory damages and $2.9 million in punitive damages. Appellant raises five issues on appeal. We need only address his contention that the trial court erred in failing to enter a directed verdict in his favor based on *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny.

In libel and slander actions brought by a public official,

> the scope of review on appeal is highly unusual and essentially does away with the notion that the appellate court will defer to the factfinder's application of law to facts . . . [Instead], an appellate court is required to conduct its own independent review of the evidence and determine for itself whether the evidence is sufficient to meet the exacting requirements of the First Amendment.

Seropian v. Forman, 652 So.2d 490, 494 (Fla. 4th DCA 1995); *see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989).

For a public official to recover in a libel and slander action, he must prove, through clear and convincing evidence, that a defamatory falsehood relating to his official conduct was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at

279-80, 84 S.Ct. 710; *see also Seropian*, 652 So.2d at 494. "A false statement of fact is absolutely necessary if there is to be recovery in a defamation action." *Friedgood v. Peters Publ'g Co.*, 521 So.2d 236, 242 (Fla. 4th DCA), *rev. denied*, 531 So.2d 1353 (Fla.1988), *cert. denied*, 488 U.S. 1042, 109 S.Ct. 867, 102 L.Ed.2d 991 (1989). The allegedly defamatory words must be read in the context of the entire publication, and if the documents could not possibly have a defamatory effect, the complaint may be dismissed or a directed verdict granted. *Id.*

> It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and convincing evidence that the defamatory statement was (1) a statement of fact, (2) which was false, and (3) made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50, 52 (Fla. 4th DCA 1976), *cert. denied*, 354 So.2d 351 (Fla.1977), *cert. denied*, 439 U.S. 910, 99 S.Ct. 277, 58 L.Ed.2d 255 (1978).

In *Seropian v. Forman*, 652 So.2d 490 (Fla. 4th DCA 1995), there was a controversy over whether a nationally known, out-of-state, medical clinic (Cleveland Clinic) could open a new hospital near Fort Lauderdale. When the Clinic applied to the State Department of Health and Rehabilitative Services (HRS) for a certificate of need[3]

---

[3] "State law [ ] bars the issuance of a license for the operation of any specified health care facility, which by definition includes hospitals, unless the provider or facility first

(CON) to operate a 400-bed hospital in the area, the wisdom of allowing this new health care provider competition became the subject of a public debate that "took place in a public forum in the context of a statutorily formalized, political administrative process." *Id.* at 491.

The gist of plaintiff's defamatory falsehood claim was that defendant accused him of "influence peddling." *Id.* at 493. Explaining why the evidence was insufficient, the court stated,

> Similarly, no reader of these letters could seriously have believed that plaintiff was being charged with receiving a bribe of "unlawful compensation" to endorse the Clinic's position. . . . Thus, even assuming that the term influence peddler was directed to plaintiff, it could only have been reasonably understood to be "rhetorical hyperbole, a vigorous epithet," used by a doctor and chief of staff who thought those arguments "extremely unreasonable."
>
> Quite apart from the legal construction of the term influence peddling, we can find absolutely no evidence of knowing falsity or reckless disregard of the truth.

Id. at 496. Consequently, this court reversed the judgment in favor of the plaintiff on the issue of liability and remanded for entry of judgment in favor of the defendant. *Id.* at 498; *compare Cape Publications, Inc. v. Adams*, 336 So.2d 1197 (Fla. 4th DCA 1976).

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obtains a 'certificate of need.' " *Seropian v. Forman*, 652 So.2d 490, 491 (Fla. 4th DCA 1995) (quoting § 381.704(2), Fla. Stat. (1987)).

Here, appellee failed to meet the clear and convincing standard for recovery by a public official for libel and slander. Appellee had the burden to prove that appellant's statements were statements of fact, his statements were false, and his statements were made with actual malice. *Early*, 334 So.2d at 52. Appellee admitted "that what Mr. Zorc did, he simply took [the] information [concerning the eminent domain proceedings], and he shared it with the reader, and rendered an opinion about what went on there." Thus, by his own testimony, appellee acknowledged that appellant's comments concerning the propriety of his conduct constituted opinions rather than facts. *See Hay v. Independent Newspapers, Inc.*, 450 So.2d 293, 295 (Fla. 2d DCA 1984).

Furthermore, the documents attached to the Complaint contained statements that the closed meetings violated the Sunshine Law and that at those meetings it was decided that appellee would be paid $32,500 for his strip of property, a substantially greater sum than that received by other property owners. The documents also urged readers to examine the alleged violations themselves and called for an open meeting. The testimony at trial and subsequent court proceedings confirmed the accuracy of those facts. Therefore, appellee failed to meet the burden of proving that the statements of fact were false.

In conclusion, we hold that the allegedly defamatory statements were opinions based upon the facts set forth in the documents, which were true. We also hold that appellee did not prove that the facts upon which the opinions were based were false or that appellant's assessment of them was erroneous. Therefore, the trial court

should have entered a directed verdict in favor of appellant. *Harte-Hanks*, 491 U.S. at 666 n. 7, 109 S.Ct. 2678. *See New York Times*, 376 U.S. at 254, 84 S.Ct. 710; *see also Seropian*, 652 So.2d 490; *Scandinavian World Cruises v. Ergle*, 525 So.2d 1012 (Fla. 4th DCA 1988); *Friedgood*, 521 So.2d at 242; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Having concluded that the statements were opinions based on facts that were not false, we do not need to reach the issue of malice.[4]

Accordingly, we reverse the final judgment in favor of appellee and remand with instructions to enter judgment in favor of appellant, Frank L. Zorc.

REVERSED and REMANDED.

WARNER, C.J., DELL and GUNTHER, JJ., concur.

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[4] Nevertheless, we note that the record does not contain clear and convincing evidence of malice. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); *Palm Beach Newspapers, Inc. v. Early*, 334 So.2d 50, 53-54 (Fla. 4th DCA 1976), *cert. denied*, 354 So.2d 351 (Fla.1977), *cert. denied*, 439 U.S. 910, 99 S.Ct. 277, 58 L.Ed.2d 255 (1978).

APPENDIX 3

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY

CASE NO.: 97-0218-CA-17

WILLIAM O. JORDAN,
Plaintiff,
vs.
FRANK L. ZORC,
Defendant.

VERDICT

WE, THE JURY, return the following verdict.

1. Did the greater weight of the evidence show that the statements made, published, or broadcast by FRANK ZORC were in some significant respect, false statements of fact which tended to expose WILLIAM JORDAN to hatred, ridicule, or contempt; or tended to injure WILLIAM JORDAN in his business, reputation, or occupation or charge WILLIAM JORDAN committed a crime?

   Yes ✔ No _____.

If the answer to number 1 is YES, please answer number 2. If your answer to number 1 is NO, your verdict is for the Defendant and you need not proceed further except to date and sign this verdict form, and return it to the courtroom.

2. At the time the statements were made, published, or broadcast, did clear and convincing evidence show

that FRANK ZORC knew the statements were false, or that he had serious doubt as to their truth?

Yes ✔ No _____.

If the answer to question number 2 is YES, please answer question number 3. If your answer to question 2 is NO, your verdict is for the Defendant, and you need not proceed further except to date and sign this verdict form and return it to the courtroom.

3. What is the total amount of damages sustained by WILLIAM JORDAN for any injury to his reputation or health, and any shame, humiliation, mental anguish, and hurt feelings caused by the incident in question?

   a) Experienced in the past?

   $1,000,000.00

   b) To be experienced in the future $250,000.00

Please answer question no. 4

4. What is the amount of any damages WILLIAM JORDAN sustained for loss of ability to earn money in the past?

   $150,000.00

Please answer question no. 5

5. What is the amount of any damages for loss of the ability to earn money in the future?

   a) Total damages over future years?

   $850,000.00

   b) The number of years over which those future damages are intended to provide compensation?

   8

c) What is the present value of those future damages?

$400,000.00

Please answer question 6.

6. Under the circumstances of this case, state whether punitive damages are warranted against FRANK ZORC.

Yes ✔ No _____.

Total lines 3a, 3b, 4, and 5c, and then write that figure on the double line below, entitled TOTAL DAMAGES. You should then date and sign the verdict form and return it to the courtroom.

TOTAL DAMAGES $1,800,000.00

SO SAY WE ALL, this 20 day of August, 1998.

/s/ Linda [Illegible]
FOREPERSON

APPENDIX 4

IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FL

CASE NO. 97-0218 CA 17

WILLIAM O. JORDAN,

Plaintiff,

vs.

FRANK L. ZORC,

Defendant.

_____/

PUNITIVE DAMAGE VERDICT

WE, THE JURY, return the following verdict.

1. What is the total amount of punitive damages, if any, which you assess against FRANK ZORC?

$2,900,000.00

If you elect not to assess punitive damages against the Defendant, you should enter a zero (0) as the amount of damages.

SO SAY WE ALL, this 21 day of August, 1998.

/s/ Linda [Illegible]
FOREPERSON

APPENDIX 5

OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

With copies to: Governor Lawton Chiles, and Gregory M. Smith, Asst. General Counsel Tallahassee, Fla. and Rep. Charles Sembler

FRANK L. ZORC, CITIZEN

Complainant

The City Council of Vero Beach, Florida that held a "private closed secret meeting" April 4, 1995, including four council members and the City Attorney Larry Braisted and other un-authorized persons.

Defendants

SUBJECT:
City of Vero Beach vs. William O. Jordan, Et. al. Case #93-028011-CA-05

Amendment-Addition of COMPLAINT of March 6, 1997

It now further appears: That an elected official Councilman Bill Jordan of the City of Vero Beach may have committed acts of malfeasance, and or misfeasance, and or obstructing the normal plan of justice for the protection of the taxpayers, by a fraudulent attempt to modify normal professional property appraisals that are obtained to protect the public, by imposing his personal value conviction upon a State of Florida licensed property appraiser, and then "asking that appraiser" to inflate the value of Mr. Jordan's *"own"*, real estate land the City was acquiring. His purpose appears to have been to discredit and reject two M.A.I. appraisers value factors. This was

to gain Mr. Jordan incredibly far more money from the City and Taxpayers than the *two* other professional M.A.I. appraisers valued the land.

FURTHERMORE, Council final actions on this matter were taken at an apparently improper illegal closed secret meeting.

ADDITIONAL BACK UP INFORMATION ATTACHED: Exhibits "A" and "B"

EXHIBIT "A"

WHY IS IT – WITH MANY PUBLIC OFFICIALS?

COMMON
SENSE IS

NOT SO
COMMON.

THIS WAS A "CLOSED SECRET MEETING" CLOSED TO THE PUBLIC AND MEDIA Apparently it was a major violation of the Fla. Sunshine Law, AND MUST YET BE RE-EXAMINED, AND RE-DISCUSSED IN THE "OPEN PUBLIC MEETING FORUM".

WHY SHOULD IT BE RE-DISCUSSED ??

A Tip of an Iceberg" excerpts follow. 26 pg. minutes of the secret meeting.

- Appraisal by M.A.I. appraiser
  Peter Armfield $ 11,900.

- Appraisal from M.A.I. appraiser
  Mr. Basile was $ 9,500.
- Appraisal from state certified
  Mr. Kmetz $ 50,000.

  Kmetz, not a M.A.I. appraiser. (Note: most banks require M.A.I. for appraisals)

- Page 24 (attached): Atty. Kretschmer, stated that in a sworn deposition Jordan's appraiser, Mr. Kmetz, said that "solely at the request of" Councilman Jordan, he inflated the appraised value to $ 50,000. *rather than* Kmetz's professional opinion of $ 34,000.

This appears to be a fraud on the taxpayers of the City of Vero Beach as well as upon the other City Council members with whom he was a serving as an elected official.

- Winchester: Made a motion at the secret meeting to pay Jordan $ 32,500.

Braisted and Winchester announced: "It was unanimous". Jordan was soon paid !
This was not discussed or acted upon at an "OPEN PUBLIC MEETING !"

EXACTLY WHAT WAS THE FINAL COST TO THE TAXPAYERS FOR A STRIP OF LAND WITH AN M.A.I. APPRAISAL OF $ 9,500. ????

CITY COUNCIL MEET 7/16/96. Caroline Ginn re Jordan Case: "it was negotiated for two years and instead of paying $ 32,500, they ended up with a bill near $ 80,000."

EXHIBIT "B"

appraisers, I remember the discuss had indicated it might be worth forty-five to fifty thousand dollars. I think that's where the $50,000 figure came from.

MR. KRETSCHMER: Mr. Jordan's opinion has always been that his property was worth in excess of $50,000. His appraiser, when I took his deposition, indicated that the appraised value in his opinion of the property was $34,000. He did have a figure of $50,000 in his appraisal but he admitted that –

COUNCILMAN HEDIN: That's where I got the 50 from?

MR. KRETSCHMER: Yeah, but that was not his opinion. He put that $50,000 figure in his appraisal solely at the request of Mr. Jordan because that was Mr. Jordan's belief of what the property was worth, which was not what the appraiser's belief as to what the property was worth.

MR. BRAISTED: Well, while you're looking at the numbers, Page 1 is the historical – what the City has spent to date. I mean, that I got from the finance department. It's accurate to the penny what checks have been written to date.

Page 2 is just speculative on my part. I don't

I hereby request that you ask the Governor of Florida to appoint a "Special Prosecutor" <u>OUTSIDE THE TREASURE COAST,</u> for a complete investigation (Similar to what the

Martin County Commissioners have recently done in the Palm Beach Post) alleged Sunshine Law Violations case.

Respectfully,

/s/ Frank L. Zorc
Frank L. Zorc
2501 27th. Ave.
Vero Beach, FL
32960

COPIES:

Jon Kaney Jr. COBB, COLE,
BELL Esq.
Press Journal –
Editor Larry Reisman
Palm Beach Post –
Pat Moore Staff Writer
Sun Sentinal –
David Nitkin Staff Writer
Kathy Inman Esq.
Mike Battaglini, Esq.
Clerk-Council-Adm.
Vero Beach, FL
Interested persons.

26state

APPENDIX 6

COPY: Cty. Commission-& Adm.

Signed, Sealed & Delivered

Corrected Copy – word change

March 10, 1997 By: Frank L. Zorc
30 year Real Estate Broker,
Vero Beach, Fl.

DETERMINING PROPERTY VALUE FOR NEEDED ROAD RIGHT OF WAY

Professional property appraisers are hired to ascertain "fair value" using their skills and reviewing all circumstances. The norm is each OWNER & CITY hire's an appraiser to act "independently", with no bias or prejudice, or influence of wishful thinking parties.

Later bargaining over the completed appraisals can be done. BUT you certainly cannot allow either party to influence or control the value of respective appraisers to the point the professional "scraps or modifies" his own views to satisfy one party. This defeats the whole concept or purpose.

And when an owner such as Jordan influences his appraiser to change his professional value to recite a value nearly *500%* larger than 2 M.A.I. appraisals, the system is broke. Why not have each party just name their own value? Why even use an appraiser?

It appears Jordan's appraiser gave up his professional ethics when he changed to a "owners opinion of value" departing from his own professional determination.

Could you hear Jordan. If other Council members suggested to M.A.I. Peter Armfield to decrease his professional calculations of value by *500%* – to suit their, "opinions"?

Jordan's actions were at least unethical and perhaps illegal for a elected official trying to influence other elected officials while aborting the system of fairness and justice.

I intend to object to the amount the City voted to pay Mr. Jordan at the secret meeting. YES, that closed to the public meeting *needs full Re examining & Re Discussion* before they make a "NEW legal decision" what to pay, at a proper OPEN PUBLIC MEETING.

Respectfully,

/s/ Frank L. Zorc
Frank L. Zorc

THIS IS A SUPPLEMENT TO MY "AMENDED-ADDITION" TO MY MARCH 6, 1996 COMPLAINT TO MR. COLTON.

XC Peter Armfield M.A.I.
& Interested persons

APPENDIX 7

Vero Beach
2A, Press Journal, Sunday, March 9, 1997

ZORC FILES THIRD COMPLAINT

By E. CHRISTINA MITCHELL
Press Journal Staff Writer

The Vero Beach City Council illegally voted to pay a fellow councilman $32,500 for his property three years ago, a complaint filed Thursday with the State Attorney's Office charges.

It's local real estate agent Frank Zorc's third complaint accusing city leaders of violating Florida's Government-in-the-Sunshine Law. The complaint accuses the City Council of violating the law when it took an official vote in an April 4, 1995, closed-door meeting.

Under state law, officials are prohibited from making final decisions during closed meetings.

The *Press Journal* reported the meeting and the vote when minutes of the meeting were released later that month. Council members discussed both the Piper Aircraft Corp. bankruptcy settlement and negotiations on a piece of property owned by Councilman William Jordan, who was absent from the meeting.

City officials agreed to pay Jordan $32,500 for land needed in the city's 10th Avenue widening project in 1994. A vote was taken, and the council unanimously agreed to make the offer.

An amended vote later was taken to ensure Jordan responded to the offer within five days.

Zorc said he decided to file a complaint after reading recent newspaper accounts of the Martin County Commission making financial decisions in closed hearings. The Palm Beach Post is challenging that action in a lawsuit.

Zorc's first complaint resulted in a grand jury investigation into whether the city violated the Sunshine Law during a May 1995 closed meeting to discuss Piper's bankruptcy. The grand jury decided the city acted properly.

A second complaint was made a year later. In August 1996, with similar charges. That, too, was dismissed because a judge ruled the council corrected its error by holding the same meeting in public.

Mayor Jack Grossett, who was at the closed meeting now being questioned, said he reviewed the minutes of the April 1995 meeting Friday.

"Obviously a decision was made, but it is the city attorney's responsibility to keep the council from doing anything like that, that is illegal."

Larry Braisted, who was the city attorney at the time, could not be reached for comment Friday. Fred Kretschmer, a private attorney who helped handle the Jordan case and attended the meeting, referred questions about sunshine violations to City Attorney Robert Sechen.

Sechen said his office will not respond to the allegations. Assistant State Attorney Lynn

Park said her office will investigate the complaint, but she could not predict how long it would take.

Comments –

Frank L. Zorc

A. Oh! Mr. Grossett, sure'ly you *know*. IGNORANCE is NO excuse for breaking the Law! When a "little citizen" *err's* with even a minor traffic violation – a penalty of $ 100, is most common. Why should our "big time" politicians walk ? And letters of Extortion & Bribery-for shame- Mr. Mayor!! And, IF you're now, finally, going to make attorneys accountable, shouldn't you start with the 7' one ? the one whose firm got $ 150,000.00 fees with NO benefit to the City and, without Council approval !

B. Did not Braisted and Sechen participate in and direct many Council violations of the Sunshine Law ?

C. And now we pass the buck and the "heat" to "poor" Mr. Sechen. Don't worry, he will gladly spend a year with his firm trying to find a way out if you let Braisted OK again, another $ 150,000.00 tax dollars, with *NO* Council Approval !

D. *OR* has Sechen's bag of "Miami Lawyer Answers and Tricks" run out ? The citizen taxpayers will not like your answer Mr. Sechen, any more than I liked the way you "blew up" at me in your Secretary's office when I gently asked for the Jordan-City files. A public servant should not "loose his cool". Very unprofessional !

Mr. Sechen, why-NO fee agreement or contract for the $150,000.00 your firm was paid by Braisted's OK ? Question: Did you remove any of the original public records from the complete files you removed from

City Hall for several weeks to Miami ? How could a citizen prove it ? You took the originals away !

E. I have requested State Attorney Colton to ask the Governor for a "Special Prosecutor" LIKE HE HAS in many *far less* controversial cases. Taxpayers don't want another Colton, "hand picked controlled jury

* * *

F. Question- for Mr. Jordan: Considering, the long time *"Jordan Political Stature", certainly* such a figurehead should know the Sunshine Law does not permit a secret meeting to take final action and pay $ 32,500.! WHY did you take this money? You should have called for "An Open Public Meeting". I think you were "overpaid", wrongly paid, and wrongly accepted tax money for your land *approved in secret.* Our constitutional rights were taken from us. A complete new "Open to The Public" discussion must be held. You may owe a refund to us.

G. I will request the City Council read into the record, & have open discussion on the recent Ft. Lauderdale "Sun Sentinel" article (by David Nitkin), reporting on, Robert Sechen's, &/or his firm's "EXCESSIVE LEGAL FEES". Quote: "Since 1994, Kubicki (Sechens firm), has charged, on average per property, nearby twice as much in legal fees as another firm doing the same kind of work". The City Manager DENIED Caroline Ginn's *written requests* for *accounting of all your fees.* WHY?

Supreme Court, U.S.
FILED
MAY 22 2001
CLERK

No. 00-1652

IN THE

Supreme Court of the United States

WILLIAM O. JORDAN,

Petitioner,

v.

FRANK L. ZORC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF IN OPPOSITION

RICHARD A. SHERMAN
LAW OFFICES OF
RICHARD A. SHERMAN, P.A.
Attorney for Respondent
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885

167091

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The question presented is whether the decision of the Fourth District Court of appeal of Florida, which was affirmed by the Florida Supreme Court on denial of discretionary review, reversing a $4.7 million dollar libel and slander Judgment in favor of an elected official and against a constituent for criticizing the elected official, is in accord with the Supreme Court's Decision in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and its progeny.

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STATEMENT OF THE CASE

The City of Vero Beach, Florida was widening a street and was taking land by eminent domain from the homeowners on one side of the street, and the Mayor of Vero Beach, the Plaintiff William Jordan had a house on that street. MAI appraisers were hired by the City and assessed the land at approximately $10,000 per home, and each landowner on the street was paid $10,000 cash, except for Mayor Jordan. When it came time for the City Council to decide how much Mayor Jordan would be paid for his property a closed meeting of the City Council was held. Mayor Jordan hired an appraiser who was not a MAI appraiser who valued Mayor Jordan's property at $50,000, and based on this at the closed meeting Mayor Jordan was paid $32,500, even though the other homeowners on the street had only received $10,000 each.

The Respondent in this case, Frank Zorc, has for years been a member of a watchdog group known as "Indian River Taxpayers Association," which watches expenditures by the City and makes certain that the taxpayer's money is well spent. When Mr. Zorc found out about the secret meeting and the fact that Mayor Jordan was paid $20,000 more than the other homeowners on the street he sent five flyers, which are in the appendix to the Brief of Petitioner, criticizing Mayor Jordan and the City Council. Mayor Jordan in return filed suit against Mr. Zorc for libel and slander.

The trial consisted of a parade of elected officials in Vero Beach who were aggrieved at Mr. Zorc for criticizing various council expenditures over the years, and this parade of elected officials testified that Mayor Jordan was a fine person and that nothing improper was done by the Vero Beach City

Council when it awarded Mayor Jordan three times as much as every other homeowner on the street. Mr. Zorc had also stated in the flyers that the secret meeting violated the Florida Sunshine Law which requires that any action by a governmental entity which takes final action on a matter must be held in public. Elected officials testified that Mr. Zorc libeled and slandered Mayor Jordan by stating that the meeting was a violation of the Sunshine Law, and pointed to the fact that a judge had ruled that the meeting did not violate the Florida Sunshine Law. However, while the case was pending on appeal, the decision of the trial court in that case was reversed by the Fourth District Court of Appeal which held that the secret meeting did violate the Florida Sunshine Law. Additionally, another case was pending in the trial court and the trial judge in that case subsequently held that other activities of the Vero Beach City Council which were the subject of Mr. Zorc's criticism also violated the Sunshine Act.

Accordingly, the decision by the Florida Fourth District Court of Appeal in this case which reversed the Final Judgment by the elected official against the constituent for $4.7 million, which decision was affirmed by denial of review without opinion by the Florida Supreme Court, was correct for three separate reasons:

(1) Under the United State Supreme Court decision of *New York Times Company v. Sullivan*, an elected official cannot recover for libel and slander against a constituent who criticized him related to his activities as an elected official, specifically in this case for recovering three times what the other homeowners on the street recovered and in an illegal meeting of the Vero Beach City Council, which was in violation of the Florida Sunshine Law.

(2) All of the comments in the articles were either substantially true or were opinion; and therefore, under Florida law even if the Plaintiff were not an elected official the articles could not be susceptible to a libel judgment because they were substantially true or opinions.

(3) The articles were "pure expressions of opinion" in that they contained the facts on which the opinions are based, and therefore these are privileged under Florida law as "pure expressions of opinion." Even if an elected official were not involved these could not be susceptible to a libel verdict because they contain the facts and are "pure expressions of opinion," under clear Florida law.

REASONS FOR DENYING THE WRIT

The Petitioner has given this Honorable Court an inaccurate view of the facts in a misguided attempt to create Supreme Court jurisdiction.

The decision of the Fourth District Court of Appeal of Florida which was affirmed by denial of review without opinion in the Florida Supreme Court is squarely mandated by this Honorable Court's decision in *New York Times Company v. Sullivan*, and its progeny. In fact, if the Florida courts had ruled the opposite and allowed an elected official to recover a libel and slander judgment against a citizen who criticized him for recovering in a secret illegal meeting three times what the other homeowners on his street recovered (which meeting the courts have held was a violation of the Florida Sunshine Law) this Honorable Court might have jurisdiction.

In other words, the case of *New York Times Company v. Sullivan* and its progeny are so clear that an elected official can almost never recover a judgment against a citizen who criticizes him for his actions in office, that if the courts had allowed this judgment of the elected official against the citizen to stand, either the Florida Supreme Court or this Honorable Court would have needed to step in to reverse this because of the unconstitutional result in the trial court.

This Honorable United States Supreme Court in *New York Times Company v. Sullivan*, held that in order for a public official to prevail in a libel trial, he must prove with "convincing clarity" that the alleged falsehood was made with "actual malice," and further the Supreme Court defined "actual malice" as being "with knowledge that it was false and with reckless disregard of whether it was false or not." This difficult test has made it practically impossible for an elected official to recover for libel and slander, was properly applied by the court of appeal in this case. There have practically no cases which have allowed recovery for a public official for libel and slander against a criticizing citizen in the 37 years since *New York Times Company v. Sullivan* was decided.

The Supreme Court further strengthened its decision in *New York Times Company v. Sullivan* with its decision in *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125. In the *Garrison* case, the question was whether ill will or intent to harm the public official was sufficient to allow a libel and slander verdict by the elected official, and the United States Supreme Court held that it was not.

The Florida Supreme Court and the state and federal courts of the United States have further strengthened this

rule of law in numerous subsequent cases. The case relied on by the Petitioner of *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949 (1984), is not on point because in *Bose* was a very strong holding against a libel and slander judgment by an elected official, in that it clarified that there is a significant difference between "mere proof of falsity" and "proof of actual malice." The United States Supreme Court held that the plaintiff must show that the citizen ". . . subjectively entertained serious doubts as to the truth of his statement." The burden was not met in the present case, especially where the Florida courts have held that the meeting at which Mayor Jordan was awarded three times as much as the other homeowners on the block, was in fact illegal and a violation of Florida law.

Furthermore, the judgment by the elected official was contrary to Florida law. Therefore even if the Petitioner's claim were in fact valid and that the decision was contrary to the standards of the United States Supreme Court in *New York Times Company v. Sullivan*, the decision is clearly proper under Florida law, and therefore must be affirmed under Florida law regardless of the United States Constitutional Standards.

In the Florida case of *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. 4th DCA 1976), a Florida newspaper embarked upon a calculated campaign designed to bring about the removal of an elected official from office and published several hundred news articles and editorials which were hostile to the elected official, many of which were defamatory. The elected official filed suit against the newspaper and members of the editorial staff and recovered a judgment of $1 million. On appeal to the Fourth District Court of Appeal, the Fourth District held the verdict was contrary to Florida law and reversed.

Further, the Florida courts in the case of *Newton v. Florida Freedom Newspapers, Inc.*, 447 So. 2d 906 (Fla. 1st DCA 1984), held that the question of whether a defendant is aware of the falsity of a defamatory statement or entertains serious doubts as to the truth of a publication, is satisfied only if it is *clear* that the defendant in fact did entertain serious doubts as to the truth of the publication. Therefore, once again, under Florida case law, the decision of the Fourth District was correct and the decision of the Florida Supreme court in denying review, was correct under Florida law.

Additionally, under Florida law the decision of the Fourth District was correct in that: (1) everything in the articles was substantially true or were opinion; and (2) the articles were "pure expressions of opinion." The law in Florida is clear that opinion cannot be the basis for libel and slander under Florida law. *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52 (Fla. 1st DCA 1981).

Since the articles contained the facts in which the opinion was based, under Florida law they are "pure expressions of opinion" and are protected under Florida law from libel and slander. In *Hay v. Independent Newspapers, Inc.*, 450 So. 2d 293 (Fla. 2d DCA 1984), a case in which a letter to the editor discussed certain facts and criticized the state attorney's office for not prosecuting someone termed a "crook," the court held that under Florida law this was "pure opinion" since the facts were contained in the article and therefore protected.

In *Eastern Air Lines, Inc. v. Gellert*, 438 So. 2d 923 (Fla. 3d DCA 1983), an Easter Air Line pilot criticized Eastern, and a spokesman for Eastern Airlines responded saying "Gellert has been complaining for years. I think you

ought to know that he wrote some very odd letters to the FBI. . . . He said Eastern was out to get him, that we tried to crash a plane in order to kill him. He's paranoid." The Third District Court of Appeal held that under Florida law this was a "pure expression of opinion" and therefore could not be subject to libel or slander.

Therefore, even *arguendo* if this Honorable Court held that for some reason *New York Times Company v. Sullivan* did not apply, nonetheless the decision of the Fourth District would need to be upheld under Florida law because the statements were either true or substantially true, and also were "pure expressions of opinion," which are not subject to libel and slander under Florida law regardless of whether any elected official was involved.

Therefore, the decision must be upheld; under Florida law even if *New York Times Company v. Sullivan* did not apply.

CONCLUSION

There is no conflict with the case law of the United States Supreme Court which would be sufficient to warrant a petition for writ of certiorari; and in fact, the decision is fully in line with the law of the United States Supreme Court.

However, *arguendo*, even if there were conflict with *New York Times Company v. Sullivan*, nonetheless the decision of the Fourth District Court of Appeal must be affirmed because there are two separate state court bases on which the ruling was correct; namely that: (1) these statements were true or substantially true; and (2) the flyers were "pure expressions of opinion" since they contain the facts on which the opinions were based. Accordingly, the Petition for Certiorari must be denied.

Respectfully submitted,

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No. 00-1652

In The

Supreme Court of the United States

WILLIAM O. JORDAN,

Petitioner,

v.

FRANK L. ZORC,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent states that Petitioner "hired an appraiser who valued [his] property at $50,000" (Resp's Brief p. 1). That is untrue. It is unequivocal that the appraiser valued Petitioner's property at $34,000.

The fact that the City Council violated the Sunshine Law has no bearing on the defamatory nature of the statements made by Respondent about Petitioner.

ARGUMENT

Respondent does not even address whether the Florida District Court applied an incorrect standard of review by conducting a *de novo* review of all issues, rather than just the issue of actual malice. Respondent's silence on this issue apparently acknowledges that the wrong standard of review was utilized by the Florida court.

Respondent's argument is that after *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), a public official "can almost never" recover from a citizen for defamation, because he cannot show actual malice. Respondent overlooks *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990); *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989); *Yetman v. English*, 811 P.2d 323 (Ariz. 1991) *en banc*; and *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684 (Ky. 1990), to name just a few cases finding evidence of actual malice sufficient to allow a jury to determine the issue.

Respondent argues that Florida law supports the Florida District Court's ruling. However, Florida law on defamation is the same as federal law on defamation. In

fact, the opinion of the Florida District Court in this case cites as accepted authority *New York Times v. Sullivan, supra; Milkovich v. Lorain Journal Co., supra;* and *Harte-Hanks Communications, Inc. v. Connaughton, supra,* all of which require reversal.

"Actual malice" was sufficiently demonstrated in this case. "Actual malice" is proven by demonstrating misstatements of fact made with knowledge of their falsity, or reckless disregard of whether they are false or not. *New York Times Co. v. Sullivan,* 84 S.Ct. at 725-26. Rarely will a party confess to actual knowledge of falsity, or a high degree of awareness of falsity or serious doubts as to the truth of the publication. Nevertheless, a plaintiff is entitled to prove a defendant's state of mind through circumstantial evidence. *Harte-Hanks Communications, Inc. v. Connaughton,* 109 S.Ct. at 2686. Here, juxtaposing Respondent's trial testimony with the defamatory statements contained in the five documents in question, demonstrates that Respondent was aware the statements were untrue, and yet he published them nonetheless. The conclusion that Respondent acted with actual malice inextricably follows.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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